

JUL 6 1984

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No. 83-2004

In the Supreme Court of the United States

OCTOBER TERM, 1983

MATSUSHITA ELECTRIC INDUSTRIAL Co., LTD., et al.;
Petitioners

v.

ZENITH RADIO CORPORATION and
NATIONAL UNION ELECTRIC CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

MOTION FOR LEAVE TO
FILE BRIEF AMICUS CURIAE

and

BRIEF OF THE GOVERNMENT OF JAPAN AS
AMICUS CURIAE IN SUPPORT OF THE PETITION
FOR A WRIT OF CERTIORARI

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Pursuant to Rule 36.1 of the Rules of this Court, the Government of Japan respectfully moves for leave to file the attached brief as amicus curiae in support of the Petition for Writ of Certiorari filed herein. The Petition raises issues of great importance to the relationship between the United States and Japan, and the Japanese Government wishes to ensure that the Court is fully apprised of its views, as set forth in the attached amicus curiae brief. Petitioners have consented to the filing of this brief; respondents have not.

(i)

For the reason stated, and in the interest of strengthening bilateral relations between Japan and the United States, the Government of Japan requests that the Court receive and consider the attached brief.

Respectfully submitted,

STEPHEN M. SHAPIRO

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*Counsel of Record for
The Government of Japan*

July 6, 1984

QUESTIONS PRESENTED

The Government of Japan will address the following questions:

Whether a court of the United States may make a decision on foreign corporations' actions which were taken in foreign territory pursuant to directions given by the foreign government for the implementation of its important trade policy; and

Whether a duly issued statement of a foreign government, attesting that it directed its citizens to pursue certain conduct restricting export trade as an exercise of its sovereign power, may be disregarded by a court of the United States and, if not, whether that court may adjudicate the veracity of such a foreign government statement.

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TO THE HONORABLE, THE CHIEF JUSTICE AND THE
ASSOCIATE JUSTICES OF THE UNITED STATES SUPREME
COURT:

The Government of Japan submits this brief as
amicus curiae in support of the Petition for Writ of
Certiorari which has been filed herein and wishes to
inform the Court as follows:

INTEREST OF THE AMICUS CURIAE

In order to assure that Japanese exporting activ-
ity is carried on in as orderly a manner as possible,
the Japanese Government has from time to time re-
quired Japanese nationals to enter into agreements
and observe regulations restricting exports from
Japan to the United States and elsewhere. In the
instant case, the Japanese Government formally ad-
vised the District Court that such agreements and

regulations, challenged in this proceeding, were required by the Government of Japan, pursuant to Japanese law, as an exercise of Japan's sovereign regulatory power over Japanese exports. On appeal, the Court of Appeals disregarded the Japanese Government's Statement and questioned whether the export agreements and regulations in fact originated with the Japanese Government.

The Court of Appeals, by taking the position as stated above, determined in effect that conduct by Japanese nationals restricting Japanese exports, undertaken within Japanese territory pursuant to the direction of the Japanese Government, may constitute or be a "feature" of a violation of the United States antitrust laws, and may be considered as such by an American finder of fact in determining whether to subject those Japanese nationals to the punitive remedy of treble damages and an injunction. Such a result would, in effect, penalize these Japanese defendants for the sovereign acts of their government and would adversely affect the smooth implementation of Japan's trade policy. The Government of Japan is deeply interested in the prompt and proper resolution of this matter.

STATEMENT

The Ministry of International Trade and Industry, an agency of the Japanese Government, which is empowered and responsible for the implementation and enforcement of the basic international trade policies of Japan under Japanese law, including the Law Concerning the Establishment of the Ministry of Foreign Trade and Industry, the Foreign Exchange and Foreign Trade Control Law, and the Export and Import Transaction Law, has directed Japanese manufacturers and exporters to enter into agreements and to

adopt and observe regulations controlling and limiting the price, quantity or other terms and conditions of exports from Japan to certain foreign markets. The agreements and regulations relating to the exportation of radios (1958-1973), television receivers (1963-1973), and tape recorders (1965-1967), came into existence pursuant to the above direction.

In 1975, after becoming aware of the lawsuits filed by National Union Electric Corporation and Zenith Radio Corporation against a number of Japanese consumer electronic product manufacturers and exporters under the United States antitrust and anti-dumping laws, lawsuits which directly challenged the agreements and regulations concerning the consumer electronic products described above, the Government of Japan transmitted a formal statement to the United States District Court for the Eastern District of Pennsylvania. (App. *infra*, 5a-16a).¹ That statement, certified directly to the District Court in 1980 by the Ambassador of Japan as *amicus curiae* (*id.* at 15a-16a), is a matter of record in this proceeding.

In its 1975 Statement, the Japanese Government clearly established that the agreements and regulations concerning the exportation of television receivers from Japan, which were in effect from 1963 to 1973, came into existence pursuant to the direction of the Government of Japan in order to assure the orderly development of Japan's export trade, and that those agreements and regulations constituted an integral aspect of the foreign economic and trade policy of the Japanese Government. (App. *infra*, 12a-13a). In March of 1981, the District Court granted summary judgment for the defendants in all respects

¹ "App." refers to the Appendix attached to this brief.

because it found no evidence from which the alleged conspiracy to fix low export prices could be found or inferred.

On December 5, 1983, the United States Court of Appeals for the Third Circuit, never mentioning the 1975 Statement of the Government of Japan and disregarding its contents, reversed and remanded the case for trial. *In re Japanese Electronic Products Antitrust Litigation*, 723 F.2d 238 (3d Cir. 1983), petition for cert. filed, 52 U.S.L.W. 3921 (June 7, 1984) (No. 83-2004). The Court of Appeals held that there was some doubt as to whether the minimum export prices and customer registration requirements (the so-called "five-company rule"), which were the subject of the agreements and regulations, had, in fact, been determined by the Japanese Government and remanded the case for trial. *Id.* at 315. The Court of Appeals stated that those agreements and regulations may only have been sponsored or "encouraged" by the Japanese Government, *id.* at 310, and that at trial the finder of fact could conclude that the Japanese Government's export control arrangements "merely provided an umbrella under which the defendants . . . fixed their own export prices." *Id.* at 315. This decision directly contradicted the 1975 Japanese Government Statement.

DISCUSSION

As declared in the 1975 Japanese Government Statement and in the diplomatic Note Verbale transmitted to the United States Government in May of 1984 (App. *infra*, 1a-4a), the Japanese Government hereby reaffirms that the export activities of the defendants, which the Court of Appeals cited as a "feature" of the alleged conspiracy to sell television

receivers at predatory low prices, were specifically required and comprehensively supervised by the Japanese Government to effectuate its foreign economic and trade policies. The Court of Appeals' conclusion that "there is no record evidence suggesting that the five-company rule originated with the Japanese Government," 723 F.2d at 315, and that there is some doubt whether the minimum export prices "were in fact determined by the Japanese Government," *ibid.*, is directly contradicted by the plain language of the 1975 Statement of the Government of Japan.

One of the fundamental characteristics of national sovereignty is the conduct of foreign relations, including foreign economic and trade relations. The Government of Japan, like the Government of the United States, is entitled to exercise its sovereignty in this regard according to its own law and policy, particularly when its exercise involves only control of Japanese nationals' activity within Japanese territory, with respect to Japan's export trade. The Court of Appeals' conclusion that there are triable issues of fact concerning the role of the Japanese Government in directing and effectuating the export control agreements and regulations, 723 F.2d at 310, 315, and that those export controls might be found to constitute or be a "feature" of the alleged conspiracy, *id.* at 305-306, directly contradicts the 1975 Statement of the Japanese Government.

It is the position of the Japanese Government that the formal representations of foreign governments concerning their sovereign acts are to be given conclusive effect, and that when the exercise of a state's sovereignty involves only control of the activity of its own nationals within its territory, with respect to

its own export trade, foreign governments and foreign courts should not question or punish such activity. Therefore, business conduct by Japanese nationals pursued within Japanese territory relating to Japanese exports and required by the Japanese Government can neither constitute nor be considered by American courts and juries as a "feature" of an alleged unlawful antitrust conspiracy.

CONCLUSION

The Government of Japan wishes to ensure that the Court is fully apprised of its view that the decision of the Court of Appeals raises most serious questions and may directly affect the future economic and trade relations between our countries. For the reasons stated, and in the interest of close bilateral economic relations between the United States and Japan, the Government of Japan respectfully requests that the Petition for Writ of Certiorari filed herein be granted in order that the contents of the 1975 Statement of the Government of Japan and the attached Note Verbale may be given proper consideration, consideration which was totally absent in the Court of Appeals' decision.²

Respectfully submitted.

YOSHIO OKAWARA

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Plenipotentiary of Japan
Embassy of Japan
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*Counsel of Record for
The Government of Japan*

July 6, 1984

² The Court may wish to request the views of the United States concerning the questions discussed in this brief *amicus curiae*.

APPENDIX

APPENDIX

EMBASSY OF JAPAN
WASHINGTON

May 29, 1984

Note Verbale

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The Embassy of Japan presents its compliments to the Department of State, and, with reference to the decision of December 5, 1983, by the United States Court of Appeals for the Third Judicial Circuit in *IN Re: Japanese Electronic Products Antitrust Litigation* (D.C. MDL. No. 189), has the honor to state the views of the Government of Japan on this subject as follows:

1. The Government of Japan has possessed a keen interest in this case, not only because it is highly questionable that a United States court should make a decision on Japanese corporations' actions which were taken within Japanese territory pursuant to the directions given by the Government of Japan for the implementation of its important trade policy, but also because a decision of U.S. court on this case could seriously hamper the smooth execution of the trade policy of the Japanese Government.

The Government of Japan wishes to express its deep concern for the above-mentioned U.S. court decision of December 5, 1983, and to clarify its position regarding the decision. The Japanese Government also requests the Government of the United States to lend its kind cooperation as stated in paragraph 4 below from the viewpoint of developing further the amicable, cooperative trade relations between Japan and the United States.

2. In connection with the proceedings of this case, the Government of Japan transmitted a formal Statement in April, 1975, to the Federal District Court for the Eastern District of Pennsylvania through the Embassy of Japan and the U.S. Department of State. The Statement established the fact that the price agreements among certain Japanese manufacturers of consumer electronic products and the regulations on registration of related distributors by the Japan Machinery Exporters Association (hereinafter referred to as "JMEA") in question came into existence pursuant to the mandatory directions given by the Government of Japan in accordance with the Export and Import Transaction Law and the Foreign Exchange and Foreign Trade Control Law.

Despite the transmission of the said Statement by the Government of Japan, the Court of Appeals, in its decision, made no reference to the Statement, or the related supplementary documents transmitted thereafter, and seemed to question the above-mentioned fact confirmed in the Statement by the Government of Japan.

The Government of Japan hereby reaffirms that, by entering into minimum price agreements with respect to export of television receivers and by adopting the JMEA regulations (including the so-called "five-company rule", which, among other things, served to control the quality of exported products), the Japanese corporations in question were acting pursuant to specific mandatory directions of the Government of Japan, and also that the Television Export Council, the Television Export Examination Committee and the Television Division of the JMEA were established, pursuant to the directions of the

Government of Japan, for carrying out and administering those agreements and regulations.

3. Moreover, the decision, of the Court of Appeals is not consistent with the view of the Antitrust Division of the United States Department of Justice that the agreements and regulations, as ordered by the Government of Japan, would not give rise to violations of United States law. Such view was expressed, for example, in the letter of answer from Mr. Donald I. Baker (then Assistant Attorney General, Antitrust Division) to Senator Edward M. Kennedy (then Chairman of Subcommittee on Administrative Practice and Procedure) dated February 16, 1977. The decision is also inconsistent with the policy of the Antitrust Division that international comity should be taken into account in applying U.S. antitrust law.

Therefore, if the Japanese firms in question should be held liable, it means imposing improper penalties on those who followed the directions of the Government of Japan and contributed to prevent "torrential increase" of exports into the United States. They have, in fact, already been improperly penalized by the action itself. Besides, this unfortunate situation could very well create extensive feelings of frustration among the Japanese public.

4. The decision of the Court of Appeals, which has considerably increased uncertainty in the trade relations between Japan and the United States, needs to be reviewed promptly by the United States Supreme Court. The Government of Japan understands that the defendants in the proceeding will file a joint petition for *certiorari* on or before June 7, 1984.

The Government of Japan expects that the Government of the United States fully understands the

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position and concerns of the Government of Japan as stated above, and, requests the Government of the United States to file an *amicus curiae* brief before the United States Supreme Court in order to secure a proper conclusion by the Supreme Court, and also request it to take all other appropriate measures for the solution of this unfortunate situation.

The Embassy of Japan avails itself of this opportunity to renew to the Department of State the assurances of its highest consideration.

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Letter From the Department of State to the United States
District Court for the Eastern District of Pennsylvania,
June 9, 1975

Department of State
Washington, D.C.

June 9, 1975

Clerk
United States District Court
U.S. District Court House
9th and Market Street
Philadelphia, Pennsylvania 19107

Dear Sir:

The Embassy of Japan has requested in a diplomatic note that the Department of State transfer to the court a statement of the Ministry of International Trade and Industry (MITI) of the Government of Japan in connection with two cases before the court, namely, *National Union Electronic Corp. v. Matsushita Electric Industrial Co., Ltd. et al.* (Civil Action No. 74-3247) and *Zenith Radio Corp. v. Matsushita Electric Co., Ltd. et al.* (Civil Action No. 74-2451). Copies of MITI's statement and the diplomatic note received from the Japanese Embassy are enclosed.

In carrying out this request of the Embassy of Japan, neither the Department of State nor the United States Government takes any position on the content of the statement or on any other aspect of the litigation in question.

Sincerely,

/s/ Phillip R. Trimble
Phillip R. Trimble
Assistant Legal Adviser for
Economic and Business Affairs

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Enclosures:

- (1) Statement of the Japanese Ministry of International Trade and Industry
- (2) Diplomatic Note from the Embassy of Japan dated April 25, 1975.

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Letter From the Embassy of Japan to the Department of
State, April 25, 1975

April 25, 1975

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The Embassy of Japan presents its compliments to the Department of State and has the honor to ask the latter to transfer to the United States District Court for Eastern District of Pennsylvania the attached statement concerning the two lawsuits between National Union Electric Corporation v. Matsushita Electric Industrial Co., Ltd. et al. (Civil Action No. 74-3247); and Zenith Radio Corporation v. Matsushita Electric Co., Ltd. et al. (Civil Action No. 74-2451).

Attachment

**Statement of the Ministry of International Trade and
Industry (MITI Statement)**

The Ministry of International Trade and Industry of the Japanese Government ("MITI") has become aware that a number of Japanese television manufacturers and exporters are being sued by National Union Electric Corporation and Zenith Radio Corporation in the United States District Court for the Eastern District of Pennsylvania for alleged violations of various United States antitrust and antidumping laws in connection with their sales of television sets for export to the United States. (National Union Electric Corporation v. Matsushita Electric Industrial Co., Ltd., et al., Civil Action No. 74-3247 and Zenith Radio Corporation v. Matsushita Electric Co., Ltd., et al., Civil Action No. 74-2451.) In these lawsuits, questions have been raised concerning certain agreements entered into among the Japanese defendants, as well as certain regulations of the Japan Machinery Exporters Association, both such agreements and regulations have come into existence pursuant to the direction of MITI.

MITI has the honor to express its deep interest and serious concern regarding these lawsuits which involve issues related to its foreign trade policy and to call your attention to the following:

1. In order that Japanese exports do not cause unnecessary disruptions in the national economies of Japan's trading partners, one of the basic trade policies is to assure that Japanese exporting is carried on in as orderly a manner as possible. MITI is the government organ empowered and responsible for the detailed implementation of the said basic trade policy.

Thus, Article 3 of the Law Concerning the Establishment of MITI (Law No. 275, 1952) sets forth the following administrative activities as being under the responsibility of MITI:

- (1) Promotion and adjustment of international trade and control of foreign exchange relating to international trade (Article 3, Paragraph 1);
- (2) Promotion of international cooperation in international trade and economic relations (Article 3, Paragraph 1-2).

Further, Article 4 of the Establishment Law defines the role of MITI as follows:

- (1) Planning and programing of basic policies concerning production, distribution, consumption, trading, etc. of goods (included is electric power) under its jurisdiction (Article 4, Sub-section 1, Paragraph 13);
- (2) To export and import (Article 4, Sub-section 1, Paragraph 16);
- (3) To restrict or prohibit export or import (Article 4, Sub-section 1, Paragraph 17);
- (4) To take the steps necessary to execute agreements and arrangements concerning international trade (Article 4, Sub-section 1, Paragraph 18);
- (5) To prohibit or restrict transactions, etc. in foreign exchange relating to international trade (Article 4, Sub-section 1, Paragraph 20);
- (6) To sanction exporters' agreements, importers' agreements and agreements of either

manufacturers or distributors concerning export products, to sanction matters to be complied with members of export associations or import associations (hereinafter referred to as "Association Regulations"), to sanction collective agreements among the said members and matters to be complied with members of export-import associations, and to supervise designated agencies. (Article 4, Sub-section 1, Paragraph 24);

- (7) To exercise such powers, other than those mentioned in the above items, as are placed under the jurisdiction of MITI by law (including orders issued thereunder) (Article 4, Sub-section 1, Paragraph 51).

2. Endowed with the said responsibilities and powers, MITI has developed under the law two basic procedures to achieve the aims of trade policy of the Government of Japan. The first procedure relates to MITI's regulatory powers provided for under the Export and Import Trading Law (Law No. 299, 1952) and the second relates to regulatory powers under the Foreign Exchange and Foreign Trade Control Law (Law No. 228, 1949). The purpose of the Export and Import Trading Law is to promote the sound development of foreign trade by preventing unfair export trading and by establishing an orderly system for export and import trading. The purpose of the Foreign Exchange and Foreign Trade Control Law is to promote the proper development of foreign trade by providing for the control of foreign exchange, foreign trade and other foreign transactions.

In order to promote the sound development of foreign trade MITI applies both laws as follows: If

some measures are deemed necessary to achieve the purposes mentioned above, MITI will generally first direct the relevant Japanese industry or trade association to enter into Arrangements (which include both manufacturers' agreements and association regulations) pursuant to the Export and Import Trading Law.

Where this procedure is deemed to be insufficient for the purpose of achieving these trade policy objectives (for example, where there is insufficient time to complete the contemplated arrangements), MITI will exercise its powers provided for in the Export Trade Control Order (Cabinet Order No. 378, 1949) under the Foreign Exchange and Foreign Trade Control Law, without prior direction to the industry or trade associations to enter into such Arrangements.

As stated above, such Arrangements concluded under the Export and Import Trade Law and carried out under the direction of the Minister of International Trade and Industry in order to assure orderly Japanese exportation activities are the actual implementation of MITI's trade policy itself. And since such direction by MITI, if disregarded, can be enforced by the power pursuant to the said Cabinet Order, it has in fact a compulsory power equivalent to law.

Once MITI has decided upon the trade policy measures to be taken and has directed the establishment of appropriate Arrangements under the Export and Import Trading Law for this purpose, the Japanese industries involved have in fact no alternative but to establish them. Therefore the Arrangements entered into under the Export and Import Trading Law in compliance with the direction of MITI are not private

agreements in effect and are no less than the implementation of the foreign trade policy of MITI, despite their form as agreements made among private parties.

3. With respect to the export of television sets to the United States, in 1962 MITI accurately recognized, in view of the importance of televisions as one of Japan's export products, the need for assuring their orderly exportation to avoid the possibility of trade conflicts.

Thus, MITI directed Japanese television manufacturers including the present Japanese defendants to enter into an agreement under Article 5-3 of the Export and Import Trading Law with respect to minimum prices and other matters concerning domestic transactions relating to exports to the United States, and further, directed the exporters to establish a new regulation to be observed by the members of the export association with respect to filing of export prices and other related matters, pursuant to the association's functions under Article 11, Sub-paragraph 2 of the same law regarding the same exports. MITI supervised the preparation of such agreements and regulation so that MITI's intention was correctly reflected. Such direction and supervision concerning minimum prices at which televisions could be sold for exportation to the United States and other matters were exercised continuously from 1963 until February 28, 1973 when such exporting arrangements were terminated.

4. Had the Japanese television manufacturers and exporters failed to comply with MITI's direction to establish such an agreement or regulation, MITI would have invoked its powers provided for in the

Export Trade Control Order under the Foreign Exchange and Foreign Trade Control Law in order to unilaterally control television sales for export to the United States and carry out its established trade policy.

Therefore, when MITI decided the above-mentioned policy with respect to such sales and directed the television manufacturers and exporters to conclude, under the Export and Import Trade Law, such agreement and regulation relating to the minimum prices at which televisions could be sold for the United States market and other matters, the Japanese television manufacturers and exporters had no alternative but to establish the agreement and regulation in compliance with the said direction.

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Certification by the Embassy of Japan, April 23, 1979

EMBASSY OF JAPAN

2520 Massachusetts Avenue, N.W.

Washington, D.C. 20008

(202) 234-2266

April 23, 1979

I Toshihiko Tanabe, Counselor, Embassy of Japan, hereby certify that the attached document is a true and correct copy of the official statement that was transmitted by the Embassy of Japan to the Department of State on April 25, 1975.

/s/ T. Tanabe

Toshihiko Tanabe

Counselor

Embassy of Japan

Washington, D.C.

April 23, 1979

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Letter from the Embassy of Japan to the United States
District Court for the Eastern District of Pennsylvania,
July 11, 1980

EMBASSY OF JAPAN
WASHINGTON, D.C.

July 11, 1980

The Honorable
Edward R. Becker
United States District Court
for the Eastern District of
Pennsylvania
United States Courthouse
601 Market Street
Room 16614
Philadelphia, Pennsylvania 19106

Dear Sir:

I have the honor, on behalf of the Government of Japan, to inform you, Sir, of the views of the Government of Japan as *amicus curiae* in reference to the proceedings IN RE: Japanese Electronics Products Antitrust Litigation, M.D.L. 189.

This letter is to certify and reaffirm that the Ministry of International Trade and Industry ("MITI") has been, since at least 1960, and continues to be the government organ empowered and responsible for the detailed implementation of the basic trade policies of the Japanese Government.

As such, MITI was and is empowered and authorized to act for the Government of Japan in making the statement as attached to the Note Verbale dated April 25, 1975 which was delivered to the Depart-

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ment of State of the United States by the Embassy of Japan.

Accept, Sir, the assurances of my highest consideration.

Sincerely yours,

/s/ *Yoshio Okawara*
Yoshio Okawara
Ambassador Extraordinary
Plenipotentiary of Japan